In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 791

SEWELL LEE AVERY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 792

SEWELL L. AVERY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON A PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

These cases involve the question whether a dividend paid to a stockholder accounting on the cash receipts and disbursements basis is returnable as part of his gross income in the year in which declared, although the dividend check is not actually received until the following year. The decision below, answering this question in the affirmative, is in accord with the decision of the Circuit Court of

Appeals for the Second Circuit in *Shearman* v. *Commissioner*, 66 F. (2d) 256, and follows the principles laid down by the Circuit Court of Appeals for the Sixth Circuit in *Commissioner* v. *Bingham*, 35 F. (2d) 503, certiorari denied, 281 U.S. 729, as to when a dividend becomes unqualifiedly subject to the demand of the stockholder. It appears, however, to be in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Adams*, 54 F. (2d) 228. The only difference between the instant case and the *Adams* case that might be considered material is that the resolution declaring the dividend in the *Adams* case contained the words "checks for the same to be mailed December 31, 1924." The court in that case, however, based its decision largely on the theory that the dividend would not in any event have been returnable until the check was actually received.

The same question arises in a number of cases under all the Revenue Acts from 1924 on, and until the conflict of decisions is resolved there will be substantial difficulties in the administration of the law. For these reasons, although we consider the decision below to be correct, we do not oppose the granting of the writ.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1934.

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